

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

ROBERT B.YOUNG  
JUDGE

KENT COUNTY COURT HOUSE  
38 THE GREEN  
DOVER, DELAWARE 19901

March 24, 2005

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RE: *State v. Leonard P. Butcher*  
I.D. No. 0403022988

Dear Counsel:

Defendant has moved this Court to issue two Orders regarding testimony. The first is to prevent the State' s witness, Detective Voshell from testifying that he identified the photograph of Defendant within an hour of the crime' s commission. The second is to prevent Detective Voshell from pointing out the defendant in the course of his trial testimony.

Each of Defendant' s Motions is DENIED.

The Second Motion, concerning in-court identification, hinges upon the success of the first Motion, concerning the original photo identification, as described below. I find the first Motion to be without merit, thereby obviating discussion of the second.

**FACTS**

On or about January 6, 2004, according to the information provided by Detective Voshell, and another officer, Detective Mailey, at the motion hearing, a confidential informant set up a meeting with Defendant for the purchase, by another (who turned out to be undercover Detective Voshell), of cocaine.

At the arranged time and location, Detective Voshell arrived in his vehicle. A man, now identified as Defendant, came up to that vehicle, stuck his head in the window, and asked of Detective Voshell what he wanted. When told, the defendant allegedly (and, for purposes of this Motion, without contradiction) said: “ O.K.”, and within 20 seconds removed his head from the vehicle and left the scene. In very short order, the same male returned to Detective Voshell’ s vehicle; stuck his head in, again; exchanged cocaine for \$20.00; and, again, after about 20 seconds, withdrew his head and departed.

Detective Mailey, who knew Defendant as “ Chow,” or something to that effect, observed some of the set-up, necessarily did not remain, drove around the block, and returned to see Defendant still there, but Detective Voshell gone.

Within an hour, Detective Voshell turned the purchased cocaine over to Detective Mailey; returned to his Dover police office; and was given a “ confirmatory photo” of Defendant—rather than an array of photos from which to match a visual recollection. All parties consider Defendant to have no particularly distinguishing characteristics (scars, tattoos, missing teeth, height or weight extremes, etc.).

Does that confrontation between Detective Voshell and the single photo of Defendant preclude its testimonial reference?

## LAW

Counsel have referenced *Walls v. State*<sup>1</sup>; *Younger v. State*<sup>2</sup>; and *Hickman v. State*.<sup>3</sup> *Hickman*, also citing *U.S. v. Simmons* and *Younger*, is the most pertinent factually, the most recent, and the most persuasive.

In brief, *Hickman* notes that a photo identification which is merely suggestive is not dispositive of the issue. So, we can assume for the moment (though such is

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<sup>1</sup> 560 A.2d 1038 (Del. 1989).

<sup>2</sup> 496 A.2d 546, 550 (Del. 1985) (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

<sup>3</sup> 846 A.2d 238 (Del. 2004).

decidedly not a finding) that the single photo demonstration to Detective Voshell is suggestive. The question is whether the single photo exposure was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”<sup>4</sup>

The Court is to consider the totality of the circumstances to determine whether the (even presumably impermissible) suggestion is reliable.<sup>5</sup>

In this case, we have two direct, literally face-to-face confrontations between Detective Voshell and the person he later identifies as Defendant. While 20 seconds times two totals less than one minute, the staring into the face of another for even 20 seconds, particularly by someone whose attention was directed to the very task of effecting an arrest, and who was a trained detective, and who viewed the confirmatory photo within an hour, is actually a prolonged period of time, suggesting a minimal likelihood of misidentification, rather than the reverse as would be required.

Accordingly, the single photo confrontation by Detective Voshell is not found to be impermissibly suggestive. Reference to the process and in-court identification of Defendant by Detective Voshell is, therefore, admissible. MOTIONS DENIED.

**IT IS SO ORDERED.**

/s/ Robert B. Young

Judge

ds

oc: Prothonotary

cc: Opinion distribution

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<sup>4</sup> *Simmons*, 390 U.S. at 384.

<sup>5</sup> *Younger*, 496 A.2d at 550.